

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CAROL BURLISON,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

CASE NO. C04-5006RBL

REPORT AND
RECOMMENDATION

Noted for March 11, 2005

This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been fully briefed and is ready for the Court's review. The undersigned submits the following report and recommends that the Court affirm the Administration's final decision.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff was 42 years old, a younger individual, on the date of the ALJ's decision (Tr. 22, 51). She has a high school education and has past relevant work experience as a restaurant worker, cook, and cashier (Tr. 60, 65). Plaintiff filed her application for SSI disability benefits on April 5, 1999 (Tr. 51-54). Plaintiff alleged an inability to work beginning sometime in 1991 due to back pain, and joint pain in her knees, wrists, and fingers (Tr. 59). Her application was denied initially and upon reconsideration (Tr. 34-41). Plaintiff filed a timely request for hearing (Tr. 44) and a hearing was held before Administrative

1 Law Judge (ALJ) Marguerite Schellentrager on March 28, 2001 (Tr. 316-340). On June 02, 2001, ALJ
2 Schellentrager issued an unfavorable decision denying Plaintiff's claim (Tr. 18-31).

3 The ALJ followed the prescribed five-step evaluation process in her decision. The ALJ determined
4 at step one that Plaintiff had not engaged in substantial gainful activity at any time since her alleged onset
5 date (Tr. 22). At step two, the ALJ found that Plaintiff had one or more medically determinable severe
6 impairments, including back, knee, and joint pain, with no evidence of severe degenerative or arthritic
7 disease; a personality disorder; mild anxiety with panic attacks; depression; obesity; and a history of alcohol
8 abuse (Tr. 22).

9 At step three, the ALJ determined Plaintiff did not have an impairment or combination of
10 impairments that met or equaled any of the Listings (Tr. 22). The ALJ concluded Plaintiff retained the
11 capacity to perform the exertional demands of light work or work which requires maximum lifting of
12 twenty pounds and frequent lifting of ten pounds (Tr. 28). The ALJ noted that some light jobs are
13 performed while standing, and those performed in the seated position often require the worker to operate
14 hand or leg controls (Tr. 28). The ALJ further noted that Plaintiff's ability to perform light work was
15 diminished as a result of her psychological impairments which preclude work requiring public contact and
16 limit her to the performance of simple, repetitive work (Tr. 28).

17 At step four, the ALJ found Plaintiff could not perform her past relevant work (Tr. 28). At step
18 five, based on Plaintiff's residual functional capacity, age, educational background, work experience, and
19 vocational expert testimony, the ALJ determined Plaintiff could perform work that exists in significant
20 numbers in the national economy (Tr. 28-29). The ALJ relied on testimony from the vocational expert
21 testimony that Plaintiff was capable of making the vocational adjustment to work as an electronic
22 assembler (light and unskilled, with 450,000 nationally and 10,000 jobs locally); and agricultural sorter
23 (light and unskilled, with 61,000 jobs nationally and 7,000 locally) (Tr. 29).

24 Plaintiff timely appealed this decision to the Appeals Council (Tr. 12-17) and the Appeals Council
25 found no basis for review of the ALJ's decision and declined Plaintiff's timely appeal, making the ALJ's
26 decision the final Agency decision (Tr. 5-6). 20 C.F.R. § 416.1481.

27 Plaintiff filed the instant matter on January 9, 2004. Plaintiff has presented additional new evidence
28 to the court and raises the following issues for the Court's review:

- 1 (1). The ALJ failed to develop the record;
- 2 (2). The new evidence verifies the severity of plaintiff's mental and physical limitations and
3 restrictions; and
- 4 (3). The ALJ failed to properly consider the medical evidence when she determined plaintiff's
5 "residual functional capacity" and the non-exertional limitations.
- 6 The additional new evidence presented to the court, but not to the Administration, consists eleven separate
7 documents, prepared mostly by Dr. Kaeley, of Pacific Sports Medicine, and Dr. Van Buskirk. The new
8 evidence is dated September 13, 2001 through April 24, 2002.

9 DISCUSSION

10 The Court must uphold the Secretary's decision if the ALJ applied the proper legal standard and
11 there is substantial evidence in the record as a whole to support the decision. Drouin v. Sullivan, 966 F.2d
12 1255, 1257 (9th Cir. 1992); Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial
13 evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
14 Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It
15 is more than a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10
16 (9th Cir. 1975); Carr v. Sullivan, 772 F. Supp. 522, 525 (E.D. Wash. 1991). If the evidence admits of
17 more than one rational interpretation, the Court must uphold the Secretary's decision. Allen v. Heckler,
749 F.2d 577, 579 (9th Cir. 1984).

18 A. *"NEW EVIDENCE" DOES NOT WARRANT REMAND OR REOPENING THE ADMINISTRATIVE 19 RECORD AND THE ALJ PROPERLY DEVELOPED THE RECORD*

20 Under the Social Security Act, the court may order the administration to consider additional
21 evidence, "but only upon a showing that there is new evidence which is material and that there is good
22 cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. §
23 405(g). Thus, the plaintiff must show that the proffered new medical evidence is: "(1) new and not merely
24 cumulative of what is already in the record, and that it is (2) material, that is, both relevant to the claimant's
25 condition during the time period for which benefits were denied and probative. The concept of materiality
26 requires in addition, a reasonable possibility that the new evidence would have influenced the
27 [Commissioner] to decide the claimant's application differently. Finally, claimant must show (3) good
28 cause for [his] failure to present the evidence earlier." Tirado v. Bowen, 842 F.2d 595, 597 (2d Cir.1988)
(internal citations omitted); see Sanchez v. Secretary of Health and Human Serv., 812 F.2d 509, 511 (9th

1 Cir.1987) and Booz v. Secretary of Health & Human Services, 734 F.2d 1378, 1380 (9th Cir. 1984).

2 As noted above the new evidence or material submitted is dated after September 2001. The ALJ's
3 decision in this matter is dated June 2001. The content matter of Plaintiff's proposed exhibits, with the
4 exception of three pages, contain medical reports that post-date the period under review in the ALJ's
5 decision of June 2, 2001. The court notes plaintiff's argument that the material has been presented to the
6 Social Security Administration in relation to a new application filed by plaintiff on or about March 18,
7 2002.

8 After reviewing the record, the court finds the newly submitted evidence should not be considered.
9 The information is not material to the ALJ's June 2001 decision. The record must close at some time. In
10 addition, some of the material appears to be cumulative of the information addressed by the ALJ.

11 Related to the issue new and material evidence, is plaintiff's argument that the ALJ failed to
12 properly develop the record. Critical to the fair and effective operation of the system for distributing social
13 security benefits based on disability is the gathering and presentation of medical evidence. Reed v.
14 Massanari, 270 F.3d 838 (9th Cir. 2001). The ALJ has a duty to assist in developing the record._
15 Armstrong v. Commissioner of Soc. Sec. Admin., 160 F.3d 587, 589 (9th Cir. 1998).

16 Here, the ALJ properly developed the record. Plaintiff argues the ALJ failed to question her in
17 depth about her physical and mental problems at the administrative hearing. The ALJ's decision
18 summarizes the medical evidence, in detail, with respect to her medical condition. At the hearing, the ALJ
19 heard Plaintiff describe her past work experiences and the physical impact. (Tr. 322-23). The ALJ
20 questioned at some length her about her social activities and living situation. (Tr. 324-30). Following the
21 ALJ's questioning of Ms. Burlison, her attorney asked her several questions with regard to her physical
22 and mental impairments. (Tr. 330-35). The medical evidence of record, along with plaintiff's testimony at
23 the hearing, provided the ALJ a well developed record to consider Plaintiff's application for social security
24 benefits.

25 *B. THE ALJ PROPERLY DETERMINED PLAINTIFF'S RESIDUAL FUNCTIONAL CAPACITY*

26 If the ALJ cannot determine whether a claimant is disabled based on a claimant's current work
27 activity or on medical facts alone, and a claimant has a severe impairment(s), a review is made of the
28 claimant's residual functional capacity ("RFC") and the physical and mental demands of the work a

1 claimant did in the past. 20 C.F.R. § 404.1520(e). The ALJ is entitled to resolve conflicts in the medical
2 evidence. Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987). He may not, however, substitute his
3 own opinion for that of qualified medical experts. Walden v. Schweiker, 672 F.2d 835, 839 (11th Cir.
4 1982). If a treating doctor's opinion is contradicted by another doctor, the Commissioner may not reject
5 this opinion without providing "specific and legitimate reasons" supported by substantial evidence in the
6 record for doing so. Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983). "The opinion of a
7 nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the
8 opinion of either an examining physician or a treating physician." Lester v. Chater, 81 F.3d 821, 831 (9th
9 Cir. 1996). In Magallanes v. Bowen, 881 F.2d 747, 751-55 (9th Cir. 1989), the Ninth Circuit upheld the
10 ALJ's rejection of a treating physician's opinion because the ALJ relied not only on a nonexamining
11 physician's testimony, but in addition, the ALJ relied on laboratory test results, contrary reports from
12 examining physicians and on testimony from the claimant that conflicted with the treating physician's
13 opinion

14 In this case, the ALJ concluded that plaintiff was not able to perform her past relevant work as a
15 restaurant worker, cook, or cashier. Accordingly, the ALJ's further evaluated plaintiff's residual functional
16 capacity "RFC " and the possibility that she would be able to perform other work. The ALJ explained in
17 her decision:

18 The claimant has asserted that her medical condition is of such severity as to preclude the
19 performance of all work activity, stating in the context of her disability reports and
20 questionnaires, and at the oral hearing, that she is unable to sit or stand for any length of
21 time. She indicated that she often needs to lie down and rest to alleviate pain in her back
22 and joints, and that she is unable to bend over or lift any significant weight. The claimant
23 states that she avoids stairs, and receives assistance from her daughter with grocery
24 shopping, yard work, household chores, and personal care tasks. She advised that her pain
25 has never been fully relieved even with physical therapy, hot showers, and the use of
26 analgesic medications. From a psychological standpoint, the claimant indicated that she is
27 unable to tolerate being near people or enclosed spaces, and often feels anxious. The
28 claimant stated that she rarely leaves her home except to go to doctor's appointments or to
the store.

The claimant is not without restriction. However, I find her assertions of incapacity to be
unsupported by the objective evidence of record, well-weighted medical opinion, or by the
consistency of the claimant's own reported and demonstrated functional ability. Despite
claims of incapacity which would not allow the claimant to perform work activity, the
claimant admitted during her June 9, 1998 evaluation at Tacoma Family Medicine that she
in fact had a "very hectic home life." When seen for psychological evaluation by Dr.
Hoiness, the claimant was observed to be calmly sitting in the waiting room; she later
waked to the examination room without difficulty. In addition, when compliant with
prescribed treatment modalities including physical therapy and home exercise, the claimant

1 was noted to have experienced significant functional improvement (Exhibit 4F:1). This
2 appears consistent with the generally benign objective findings noted on multiple physical
3 examinations as outlined above.

3 (Tr. 25-26).

4 Substantial evidence in the record supports the ALJ's evaluation of plaintiff's RFC. The ALJ relied
5 upon Dr. Green's opinion in reaching a determination of non-disability (Tr. 24, 26, 28). The ALJ
6 specifically concluded that his determination of Plaintiff's residual functional capacity (RFC) was consistent
7 with Dr. Green's assessment (Tr. 28). The ALJ noted Dr. Green's observation that Plaintiff may have
8 difficulty performing consistent work activities based on her anxiety and compulsive disorder symptoms,
9 and accordingly limited her RFC to preclude work requiring public contact and limited to no
10 more than the performance of simple, repetitive work (Tr. 28). The ALJ's RFC determination is also
11 consistent with the opinion of Dr. Hoiness. Dr. Hoiness' assessment of a GAF score of 60 indicates the
12 highest score possible in a range with moderate limitations; indicating "[m]oderate symptoms (e.g., flat
13 affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational,
14 or school functioning (e.g., few friends, conflicts with peers or co-workers). These limitations are
15 consistent with the ALJ's assessed RFC, and were presented in his hypothetical to the vocational expert
16 (Tr. 33). Reviewing the entire record, the ALJ findings are based on substantial evidence from which
17 logical inferences may be made.

18 CONCLUSION

19 Based on the foregoing discussion, the Court should affirm the administrations decision to deny
20 plaintiff's applications for social security benefits. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the
21 Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file
22 written objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those
23 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
24 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **March 11, 2005**, as
25 noted in the caption.

26 DATED this 15th day of February, 2005.

27 /s/ J. Kelley Arnold
28 J. Kelley Arnold
U.S. Magistrate Judge